lishing a general basis of rates throughout the country, can confer upon a state corporation the power to charge on intrastate traffic a rate of fare which, under the law creating the corporation, it has no power to charge.[26]

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CAN AN INJURY BY A GOVERNMENT VESSEL CREATE A MARITIME LIEN?

Mr. Justice Holmes in a recent decision of the United States Supreme Court, *United States v. Thompson* (1922) 42 Sup. Ct. 159, has upset a long established doctrine of maritime law—justifying the revolution on the ground that he was doing away with a fiction. The importance of the case warrants an examination of the soundness of his logic and of the public policy involved.

It had been deemed a settled rule that when a vessel owned or requisitioned and operated by the Government collided with a private vessel, a maritime lien against the former for the damage caused could not be enforced while it was under government control but could be enforced as soon as it reached private hands.[1] A British admiralty court has in fact so decided within the last few weeks.[2] In the decision under discussion, the Supreme Court dealt with three ships, each of which while under government ownership or control had collided with a private vessel, the owners of which libelled the offending vessels after they had passed out of government control into private hands. In each case the Supreme Court issued a writ of prohibition preventing the United States District Courts from exercising jurisdiction.

Perhaps the most noteworthy feature of the decision—five judges against three—is the ground upon which Justice Holmes, speaking for the majority, supports it. He addresses himself not to the policy or expediency of the rule denying redress to the victim of the collision, but derives his conclusion from the application of pure logic—a mode of judicial reasoning to which Justice Holmes has been known to object.[3] He asserts that no lien could arise against a vessel operated by

[26] It seems that Congress may confer upon a state corporation powers which it does not possess under its state charter. *Cherokee Nation v. So. Kansas Ry.* (1890) 135 U. S. 641, 657, 10 Sup. Ct. 965, 971. Whether Congress has done this in the present instance may be more doubtful, though sec. 13, as amended, seems to be sufficient for this purpose.

[1] *The Siren* (1868, U. S.) 7 Wall. 152; *The Athol* (1842) 1 Wm. Rob. 374; *Workman v. New York* (1899) 179 U. S. 552, 566, 21 Sup. Ct. 212, 217; *The Florence H.* (1918, S. D. N. Y.) 248 Fed. 1012.

[2] *The Tervaete* (1922) 38 T. L. R. 460, by Sir Henry Duke, President of the Probate and Admiralty Division.

[3] Holmes, *Collected Legal Papers* (1920) 181; see also the dissenting opinion of Mr. Justice Holmes in *Vegelahn v. Guntner* (1896) 167 Mass. 92, 106, 44 N. E. 1077, 1080: "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."

the Government, even for future enforcement against a private vendee, because the "United States has not consented to be sued for torts and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so." That is, because there is no immediate remedy, there is no legal injury. There never having been a "tort" creating a lien, there was none to revive or enforce against the vessel when it came within private control. "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp." And he justifies his assumption that the Government could not commit a "tort" on the absolutist theory of Hobbes, to which Justice Holmes has given expression on a number of occasions,[4] "that the authority that makes the law is itself superior to it, and that, if it consents to apply to itself the rules that it applies to others, the consent is free and may be withheld."

It is believed that there are several fallacies in this reasoning which account for a decision involving an undesirable overturn of the law contrary to good public policy. Maritime liens and the convenience of bringing the defendant into court by permitting the plaintiff to attach the *res* lie at the foundation of maritime enterprise, insuring that security which it is one of the functions of the law to promote. It should not be lightly abandoned.

Does Justice Holmes aid the solution of the legal problem by saying that as the United States has not consented to be sued for torts, therefore "in a legal sense the United States has not been guilty of a tort?" The immunity of the King from suit, derived from history, convenience, or expediency, was primarily jurisdictional in character, and the resulting dictum that in substantive law the King could do no wrong was an inaccurate fiction. The injury at all events gave rise to a legal right, usually against the officer.[5] While it may be true that as a matter of private law, the absence of an enforceable remedy justifies the conclusion that there was no breach of duty, still it seems like a *non sequitur* to assert that because the Government cannot commit a "tort" in a "legal

[4] *Kawananakoa v. Polyblank* (1906) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527.

[5] Among the various grounds advanced to sustain the immunity of the King from the jurisdiction of the courts were these: that the King cannot issue a writ to himself: *United States v. Lee* (1882) 106 U. S. 196, 206, 1 Sup. Ct. 240, 248; that there is an inconsistency in the idea of supreme executive power and subjection to suit: *Briggs v. Light Boats* (1865, Mass.) 11 Allen, 157; that it would embarrass the State in the performance of its duties to be compelled to submit its instruments and property to the control of courts, to judgment and execution: John Marshall in the Virginia Convention, 3 Elliott's Debates quoted in *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504; also Matthews, J., in *In re Ayers* (1887) 123 U. S. 443, 8 Sup. Ct. 164; that states should not be coerced to pay debts which for various reasons they might not be willing or conveniently able to pay, thus suggesting the main reason for the adoption of the Eleventh Amendment: Marshall, C. J., in *Cohens v. Virginia* (1821, U. S.) 6 Wheat. 264, 406.

sense"—a conception of private and not of public law—therefore it cannot commit an injury which may give rise to a maritime lien "against the vessel"—admitting for the moment this cryptic concept of maritime law. If it is true that there was no initial maritime wrong, as Justice Holmes says, why could the resulting damages be set off or recouped when the Government instituted an action against the vessel injured?[6] It will be conceded that the Government is capable of waiving its immunity from suit;[7] and if it does so, the jurisdictional bar being thus removed, is there any doubt what law is to be applied? The maritime law in fact permits the enforcement of various liens even against Government property where the Government's possession is not disturbed.[8] The collision endows the owner of the injured vessel with certain rights enforceable against the Government itself, according to settled rules of law—provided the Government waives its jurisdictional immunity by entering an appearance[9]—and enforceable against any future private owner of the vessel. In this respect the victim may be said to have a future conditional right, and it rests upon the fact that he was injured and that sound policy requires compensation, except at direct government expense. The inability to enforce the "lien" against the Government—the owner can of course sue the wrongdoing officer *in personam*—is not an indication that there was no legally operative fact creating a cause of action, future and conditional though it may be. A foreign ambassador committing a common-law crime is immune from prosecution by virtue of his official position, but when his diplomatic immunity ceases and he becomes a private citizen within the jurisdiction is there any doubt as to his liability to punishment or as to the law applicable?[10] Justice McKenna, dissenting in the instant case, must therefore be supported when he says: "I reject absolutely that because the Government is exempt from suit, that it cannot be accused of fault." Whether or not the United States was "guilty of a tort" in a "legal sense," seems altogether immaterial.

Equally open to question, in the judgment of the writer, is the concep-

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[6] *The Siren, supra* note 1. Mr. Justice Holmes makes an unconvincing effort to distinguish this case, which seems to contradict his theory that there never was a "tort" *ab initio*. See *United States v. Ringgold* (1834, U. S.) 8 Pet 150. Before international tribunals, there is no doubt of the Government's liability for negligent collisions by its public vessels. *The Sidra* (Great Britain) *v. United States,* tribunal under Treaty of August 18, 1910, decided Nov. 29, 1921. (1922) 16 AM. JOUR. INT. LAW, 110.

[7] *De Simone v. Transportes Maritimos do Estado* (1922, App. Div.) 192 N. Y. Supp. 815, 816, and cases there cited.

[8] *The St. Jago de Cuba* (1824, U. S.) 9 Wheat. 409 (lien for seaman's wages); *United States v. Wilder* (1838, U. S. C. C.) 3 Sumner, 308 (lien for general average); *The Davis* (1869, U. S.) 10 Wall. 15; *United States v. Morgan* (1900, C. C. A. 4th) 99 Fed. 570, 572 (lien for salvage).

[9] *The Athol, supra* note 1; Act of Sept. 7, 1916 (39 Stat. at L. 728, 730) ch. 451, sec. 9; Act of March 9, 1920 (41 Stat. at L. 526) ch. 95, sec. 4.

[10] *Re Suarez* [1918, C. A.] 1 Ch. 176.

tion that the authority that makes the law is superior to it. The thesis may involve a restricted definition of law, to which all persons may not be willing to subscribe. Regarding law, however, as the body of rules of conduct which express the moral sense or conceptions of convenience of the organized community as to human relations, whether derived from custom or statute, and whose violation[11] is visited with social disapproval, courts constituting but one of several agencies for this purpose—it may still be true that while the rules of private law may be inapplicable to many of the activities of the Government, nevertheless the Government cannot be said to be above the rule of law—usually public law. Because the judgments of the Court of Claims cannot be enforced without a voluntary appropriation by Congress, can it be said that the rules of conduct laid down by that court as to the relation between the Government and the individual are not law? And even if the individual must still suffer many injuries at the hands of the Government without compensation, does it follow that the Government is thereby superior to the law? Is not its very immunity from suit or responsibility the rule of public law governing the individual's relation to the state in many (not all) of the state's activities? The alleged superiority of the state to the law may have been consistent with the theory of the autocratic king and state which Hobbes and Austin had in mind, but it seems inconsistent with constitutional self-government. It may be consistent with the *Machtstaat* which prevailed in political theory during the seventeenth and eighteenth centuries, but it is inconsistent with the *Rechtstaat* which has received almost universal support in Europe since the middle of the nineteenth century.[12] Is not the state the aggregate, the associated people?[13] Why assume that the group intends to regard itself as above all law, or has endowed any of its agencies, legislative or judicial, with the power to assert such superiority? The courts of other countries, such as France and Germany, find no sacrilege in subjecting the state to law—in many instances applying the rules of private law—and in holding the state primarily or secondarily responsible for the tortious acts of its officers, often without the aid of statute.[14] Writers like Dicey[15] and Vinogradoff[16] deny any superiority or irresponsibility of the state to law.

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[11] There are, of course, many rules of law, principally involved in the conception of privilege, which are incapable of violation.

[12] Duguit, *Law in the Modern State* (1919) ch. 1; Krabbé, *Die Moderne Staats-Idee* (2d ed. 1919) chs. 1 and 2.

[13] Carré de Malberg, *Contribution à la Théorie Générale de l'Etat* (1920) 31.

[14] See citations in Hauriou, *Les Actions en Indemnité contre l'Etat pour Prejudices Causés dans L'Administration Publique* (1896) 6 REV. DE DROIT PUBLIC, 51-65; Bernegg, *Uber die Entschädigungspflicht des Staates bei Ausübung der Oeffentlichen Gewalt* (1921). The numerous qualifications of the doctrine in continental Europe will be reserved for subsequent discussion.

[15] Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915) 179 *et seq.*, 402 *et seq.*

[16] Vinogradoff, *Outlines of Historical Jurisprudence* (1920) 85.

Apart from the dangerous public policy of regarding groups in the community, political, social, or industrial, even the group of the whole, as above the law, and the injustice done in the instant case to the innocent victim of official carelessness, the theory relied upon by the court manifests a tendency to enlarge the scope of governmental immunity from suit and responsibility. This is directly opposed to that of the rest of the world and even to that found in our law of municipal corporations. It but indicates the need in this country of further legislative protection for the individual against the injuries inflicted upon him in the operation of the social enterprise known as the state.

E. M. B.

LIABILITY FOR PAYMENTS ON STOCK ISSUED FOR OVERVALUED PROPERTY OR FOR PROPERTY NOT LEGAL PAYMENT

Under modern statutes payment for the issue[1] of stock by a corporation is often expressly limited to money or property actually received, or labor done, other forms of payment being forbidden. Furthermore the property or labor must not be overvalued.[2] Some statutes also provide that no issue can be made until the stock is full-paid.[3] In cases where stock has been issued, or a contract made for its issue, in violation

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[1] The term "issue" in the phrase "issue of stock," as it is used in the cases, is metaphorical, and perhaps derived from the actual issue of certificates. The phrase "issue of stock" seems to be used by the courts to signify corporate recognition of a subscriber as owning a share, or proportional interest, in the capital assets of the corporation.

[2] The methods of determining sufficiency of value are outside the strict scope of this comment. One of two rules is usually used. The first is the true-value rule. This in effect is that the received property is sufficient to authorize a given issue of stock when the true value of the property is equal to the nominal value of the issue, or to the value authorized by charter to be received in return for the issue. For purposes of applying this rule, the value of the property seems to consist in its actual purchasing power in terms of dollars at the time of the transaction. The true-value rule was applied in *Tramp v. Marquesen, infra,* note 6; *Lavell v. Bullock, infra* note 15; *Detroit-Kentucky Coal Co. v. Bickett Coal and Coke Co., infra* note 10. The second method is the good-faith rule, which briefly is that the property is sufficient when the appraisal of its value, made in good faith by the directors of the corporation, is equal to the nominal value of the issue, or to the value authorized by charter to be received in return for the issue. This test of value substitutes for a determination of actual purchasing power an estimated purchasing power. *Caldwell v. Robinson* (1920) 179 N. C. 518, 103 S. E. 75; *Conley v. Hunt* (1920) 94 Conn. 551, 109 Atl. 887. The good faith rule was applied in *Scully v. Automobile Finance Co.,* and *Winters v. Lindsay, infra* note 5.

[3] Where a statute is of this kind, the issue of stock at a discount, payment being made in money, is analogous to an issue for overvalued property, and is so treated in this comment. The corporation accepts $20, and issues stock of $100 par value. It thus receives property worth only $20 and makes an issue that is only authorized to be made for $100.